

Tran (Migration) [2018] AATA 1908 (4 May 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Quoc Tien Tran
VISA APPLICANT:	Miss Thi Ngoc Hanh To
CASE NUMBER:	1700663
DIBP REFERENCE(S):	2016038307
MEMBER:	Susan Trotter
DATE:	4 May 2018
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cl.300.211 of Schedule 2 to the Regulations • cl.300.214 of Schedule 2 to the Regulations • cl.300.215 of Schedule 2 to the Regulations • cl.300.216 of Schedule 2 to the Regulations • cl.300.221 of Schedule 2 to the Regulations

Statement made on 04 May 2018 at 5:27pm

CATCHWORDS

Migration – Prospective Marriage (Temporary) (Class TO) visa – Subclass 300 (Prospective Marriage) – Genuine and continuing relationship – Contact via social media – Money transfer and gifts – Witness statements – Notice of Intention to Marry – Decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65, 360

Migration Regulations 1994, r 1.15A, Schedule cls 300.211, 300.214, 300.215, 300.216, 300.221

CASES

Bretag v Immigration Review Tribunal [1991] FCA 755

Minister for Immigration and Ethnic Affairs v Pochi (1980) 4 ALD 139

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 6 May 2016. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on 12 December 2016 on the basis that there was not sufficient evidence to demonstrate that the review applicant and the visa applicant have ever been, nor intend to be in a genuine and continuing relationship, such that the delegate was not satisfied that they genuinely intended to live together as spouses as required.
4. The review applicant applied to the Tribunal on 12 January 2017 seeking review of the delegate's decision.
5. In accordance with s.360(2)(a) of the Act, the Tribunal considered it should decide the review in the applicant's favour on the basis of the material before it. It was therefore unnecessary to invite the applicant to appear before the Tribunal.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

ISSUES

7. The Prospective Marriage (Temporary) (Class TO) visa is a visa for persons seeking to enter Australia to marry, after their first entry to Australia, an Australian citizen, Australian permanent resident or eligible New Zealand citizen who is their prospective spouse with a view to remaining permanently. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Regulations.
8. The relevant primary criteria to be satisfied at the time of application include that:
 - (a) the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen: cl.300.211;
 - (b) the parties have met and are known to each other personally since each turned 18: cl.300.214;
 - (c) the parties genuinely intend to marry and intend that the marriage will take place within the visa period: cl.300.215; and
 - (d) the parties genuinely intend to live together as spouses: cl.300.216.
9. Additionally, the parties need to continue to meet these primary criteria at the time of decision: cl.300.221.

10. **CONSIDERATION OF CLAIMS AND EVIDENCE**

11. The review applicant provided documentation to Tribunal in relation to the parties' relationship, including photographs, receipts for money transfers, copies of Viber, Facetime and Facebook messages and extracts, joint travel documentation, documentation showing the temporary registration (on two occasions) of the review applicant to stay at the visa applicant's parents' residence in Vietnam, the review applicant's superannuation and life insurance statement showing the visa applicant nominated as his partner and beneficiary, witness statements including the parties, the visa applicant's mother, the review applicant's mother, the review applicant's friend, the visa applicant's aunt, the visa applicant's friend and the visa applicant's neighbour and an updated Intention to Marry.

12. **Issue 1 – Were the relevant primary criteria satisfied at the time of the visa application?**

13. ***Did the visa applicant intend to marry an eligible person?***

14. The Tribunal has sighted identity documents and is satisfied that at the time of application, the review applicant was an Australian permanent resident. Based on written and oral evidence before the Tribunal, the Tribunal is also satisfied at the time of the visa application, the visa applicant intended to marry the review applicant. It follows that the requirements of cl.300.211 were met at the time of application.

15. ***Had the parties met and were they known to each other personally since each turned 18?***

16. The Tribunal is satisfied, based on identity documents, travel documents, movement records from the Department, witness statements and photographs before it, that at the time of the visa application, the review applicant and the visa applicant had met and were known to each other personally since each turned 18. It follows that the requirements of cl.300.214 were met at the time of the visa application.

17. ***Did the parties genuinely intend to marry and intend that the marriage would take place within the visa period?***

18. The Tribunal notes that neither the review applicant (who is currently aged 23) nor the visa applicant (who is currently aged 21) have previously married. The Tribunal has sighted an updated Notice of Intention to Marry on 7 October 2018 (to replace the previous Notice of Intention to marry on 14 February 2017 given that date has now passed). The Tribunal accepts based on all of the evidence before it that at the time of the visa application, the review applicant and the visa applicant had a genuine intention to marry at the time of application and satisfied the requirements of cl.300.215(a). Further, the Tribunal accepts that the marriage was intended to take place within the visa period as required by cl.300.215(b). It follows that the requirements of cl.300.215 were met at the time of the visa application.

Did the parties genuinely intend to live together as spouses?

19. Clause 300.216 requires that at the time of application '*the parties genuinely intend to live together as spouses*'.
20. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the

exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).

21. In considering this visa application, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships, that is the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other: r.1.15A(4). Whilst it is not appropriate to consider whether the parties are spouses, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations. The question is whether the parties genuinely intend to live together as spouses.
22. The Tribunal notes the decision of *Bretag v Immigration Review Tribunal* [1991] FCA 755 in which O'Loughlin J quoted from *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 160, and indicated that the Tribunal may have regard to the subsequent history of a relationship for the purpose of testing or determining whether the relationship was genuine at the time of application, so long as it "*tends logically to show the existence or non-existence of facts relevant to the issue to be determined*". To the extent relevant the Tribunal has had regard to subsequent documentary evidence in assisting its assessment of the relationship at the time of the visa application.

23. *Formation and development of the relationship*

24. The Tribunal accepts that the review applicant and visa applicant first met on 8 February 2015 when the review applicant was visiting Vietnam in company with a friend and met the visa applicant via her aunt (whom the review applicant knew of from his employment in Australia) at a restaurant in Saigon. The Tribunal accepts that they remained in contact after this meeting with the review applicant returning to Australia in March 2015 and then returning to Vietnam to visit the visa applicant on two extended visits (which included a side trip together to Singapore) between that time and the date of the visa application, and with them remaining in contact by Viber, Facetime and Facebook in between visits.

25. *Financial aspects of the relationship*

26. With regard to the financial aspects of the relationship, the Tribunal is satisfied on the evidence before it that the review applicant has transferred money to the visa applicant in Vietnam on a number of occasions for gifts and also to assist with unexpected expenses, including unexpected expense of the visa applicant's father's medical bills.
27. Further, the Tribunal notes the evidence before it that the review applicant has nominated the visa applicant as his partner and beneficiary in relation to his superannuation and life insurance.
28. The Tribunal recognises that the review applicant's and visa applicant's current circumstances of living in different countries means that they have so far had limited opportunity to intermingle their financial affairs. Nonetheless, there is evidence of intermingling of financial affairs as canvassed consistent with a genuine intention to live together as spouses.

29. *The nature of the household*

30. The Tribunal accepts, as evidenced by documents before the Tribunal, that the review applicant and the visa applicant currently live in different countries. Notably, however, the evidence shows that they shared accommodation at a hotel in Singapore from 29 August to 1 September 2015, lived together at an apartment in Vietnam and at a hotel in Thailand between 28 January 2016 and 10 March 2016 and 5 July 2016 and 4 September 2016 when

the review applicant visited the visa applicant. Further, the documents show that the review applicant stayed with the visa applicant and her parents when he visited Vietnam between 18 January 2017 and 24 March 2017 and 25 December 2017 and 6 February 2018.

31. Whilst the review applicant and the visa applicant currently live in separate countries, the Tribunal is satisfied that they do not intend to do so on a permanent basis and that they have made genuine attempts to spend time with each other and maintained a household together when they have. The Tribunal is satisfied that they genuinely intend to establish a permanent household together in Australia when visa conditions allow.
32. Given the limited opportunity the parties have had to be in the same country, and given that the parties are not yet married, it is understandable that they have not established a permanent household together. However, the Tribunal is satisfied that they have resided together for most of the time they have been in the same country, Vietnam. The Tribunal accepts that the parties have, at all times since deciding to marry, genuinely held plans to establish a permanent household together, which plans are consistent with them having an intention to live together as spouses.

33. *The social aspects of the relationship*

34. The Tribunal had the benefit of a number of witness statements, and photographs, as to the social recognition of the review applicant's and visa applicant's relationship.
35. The Tribunal is satisfied that at the time of application the parties were recognised by their family and friends as having a genuine intention to live together as spouses and that when able to, they planned and undertook social activities together.

36. *The nature of the persons' commitment to each other*

37. The Department delegate had concerns as to the visa applicant not providing details about her upcoming wedding when asked at interview. However, as submitted, the Tribunal accepts that the questions asked of the visa applicant by the Department were very closed questions and did not give her the opportunity to provide such detail. Further, the Tribunal accepts that a slight discrepancy by the visa applicant in relation to the duration of one of the review applicant's visits to Vietnam is understandably explained by the evidence that shows that the review applicant, on a number of occasions, extended the duration of his visits to Vietnam beyond the originally intended times in order to spend more time with the visa applicant. Given these changes, and the number of visits the review applicant has made to the visa applicant in Vietnam, it is understandable that the visa applicant would not necessarily remember all of the exact durations of the review applicant's visits. Further, the Tribunal does not place any adverse weight on the fact that the review applicant's mother did not visit the visa applicant's family at home when visiting Vietnam and rather only met with them at a restaurant, including for the practical reasons of more space at the restaurant for an extended family gathering (of 11 people) and because of time restraints when the review applicant's mother was visiting from Australia. The Tribunal accepts these matters as entirely reasonable explanations in the circumstances. The Tribunal also accepts the reasons stated as to why the parties wish to conduct an engagement celebration in Australia rather than Vietnam and find these reasons entirely plausible in their particular circumstances.
38. The Tribunal has the benefit of very voluminous records of contact between the review applicant and the visa applicant. Although the records are not translated into English, the Tribunal accepts that the contacts are between the review applicant and visa applicant via various social media platforms and are frequent and significant, consistent with their claimed relationship and their claimed intention to live together as spouses.

39. The Tribunal has had the benefit of significantly more evidence before it than was before the Tribunal. Having regard to all of the evidence before it, the Tribunal is satisfied that at the time of visa application, the parties had a significant commitment to each other and that the parties saw the relationship as long-term.
40. Having had regard to all of these matters, the Tribunal is satisfied that the parties had a genuine intention to live together as spouses at the time of the visa application, which was approximately 15 months after they first met and six months after they became engaged. It follows that the requirements of cl.300.216 were met at the time of application.

Issue 2 - Do the parties continue to meet time of application requirements at the time of decision?

41. The Tribunal is satisfied, based on the statements before it and the Notice of Intention to Marry, that the review applicant and visa applicant intend to marry on 8 October 2018 if the visa is granted.
42. The Tribunal is also satisfied that since the time of the visa application, the review applicant has continued to transfer money to the visa applicant to assist with various expenses, that they have stayed in regular contact, including by visits of the review applicant to the visa applicant in Vietnam. Further, the Tribunal accepts that the parties continue to be recognised by their family and friends as having a genuine intention to marry and a genuine intention to live together as spouses, as evidenced by the various statements provided.
43. The Tribunal is satisfied that these matters are supportive of a continuing intention of the parties to marry and a continuing genuine intention to live together as spouses.
44. Having taken all matters into account, the Tribunal is satisfied that the parties continue to meet cl.300.211, cl.300.214, cl.300.215 and cl.300.216 at the time of decision. It follows that the requirements of cl.300.221 are met at the time of decision.
45. The Tribunal notes the delegate's concerns as already canvassed; however as noted the Tribunal has had the benefit of significantly more evidence before it than was before the delegate.

46. *Conclusion*

47. Given the findings above, the appropriate course is to remit the application for the visa to consider the remaining criteria for a Subclass 300 visa.

DECISION

48. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
- cl.300.211 of Schedule 2 to the Regulations
 - 49.
 - cl.300.214 of Schedule 2 to the Regulations
 - 50.
 - cl.300.215 of Schedule 2 to the Regulations
 - cl.300.216 of Schedule 2 to the Regulations

- cl.300.221 of Schedule 2 to the Regulations

Susan Trotter
Member